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## Homelessness As a Challenge for the European Union

Vonk, Gijsbert

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### **Homelessness as a challenge for the European Union**

Gijsbert Vonk

# **Homelessness as a challenge for the European Union**

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ACCESS EUROPE Research Paper 2017/05



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Gijsbert Vonk

Professor of social security law, University of Groningen

[www.accesseurope.org](http://www.accesseurope.org)

**Abstract**

This paper contains a broad overview of law and governance aspects pertaining to the problem of homelessness. The prevention of homelessness has become a constitutional imperative. Yet this does not mean to say the law always works in favour of the inclusion and emancipation of the homeless. Rigid exclusions remain, in particular for immigrants, and repressive policies are on the rise. In the meantime courts soften the worse consequences of these policies by offering human rights remedies. This paper addresses the question of how European policy can respond to this state of affairs. Is it feasible that the remaining restrictions applying in the field of freedom of movement and access to social rights could be lifted in order to give full protection to all mobile citizens, including those with insufficient resources of their own? Or is it possible to introduce common standards for the protection of the homeless in an EU instrument who are in a vulnerable situation, regardless of their nationality?

**Keywords**

Homelessness, social human rights, public order, repression, migration, freedom of movement of persons, protection of asylum seekers.

## **1 Introduction**

This paper contains a broad overview of law and governance aspects pertaining to the problem of homelessness. The main question is what policy challenges arise in this field for the European Union. After paying some attention to the definition and the extent of homelessness in the EU (Section 2), four separate strands of 'law and governance' will be analysed:

- Section 3: Homelessness as a constitutional question (local dumping)
- Section 4: Homelessness, public order and criminal law (repressive legal responses to homelessness);
- Section 5: Homelessness, mobility and immigration (access to housing and social benefits for migrants and mobile citizens); and
- Section 6: Human rights responses and access to justice (landmark cases and possibilities for the homeless to access the protection of the judiciary).

Each of these sections is split up between an analysis of the legal situation and an overview of the main policy challenges following from this legal situation. Then the last part of this contribution - Section 7 - is devoted to some ideas for strengthening the legal position of the homeless, using the EU as a platform. Two options will be described. The first one deals with the position of EU-citizens. As it appears the present state of European Union law does not fully take away the legal causes of homelessness for EU mobile citizens. Is it feasible that the remaining restrictions applying in the field of freedom of movement and access to social rights could be lifted in order to give full protection to all mobile citizens, including those with insufficient resources of their own? As fear for social tourism and abuse of welfare rights is often adduced as the main obstacle for making this last step, we will focus in particular on various methods of sharing the costs of providing housing and social assistance between the member states. Perhaps such burden sharing may take away some of the fears that exist in many member states. The second scenario explores the possibility of introducing common standards for the protection of the homeless in an EU instrument. In particular I am interested in standards that reflect the minimum human rights responsibility member states have towards the protection of vulnerable persons who are in a situation of extreme need who reside in their territories, regardless of nationality and immigration status.

## **2. Defining and measuring homelessness in the EU**

The European Union has agreed a core set of poverty and social exclusion indicators which are

regularly produced for every EU country for reporting and statistical purposes. These so called 'Laeken Indicators' use less than 60% of the net income national median as a sort of outer circle within which a risk of poverty occurs. Within this circle there are different criteria which measure more severe forms of poverty: social exclusion and destitution and severe destitution.

The figures on poverty in Europe produced by Eurostat, the statistical bureau of the EU, do not paint a rosy picture. In 2012, 124.5 million people in the EU-28 were at risk of poverty and social exclusion.<sup>1</sup> This is almost 25% of the population. This is not only measured with reference to the outer 60% threshold but also taken into account the situation of severe material deprivation and living in a household with no work. The number of poor people in Europe is rising as a result of the severe financial and economic crisis that rocked the world in 2008.

Homelessness must be seen as the worst manifestation of poverty. It is a complex phenomenon and may take different forms and shapes: living in make shift camps, overcrowded temporary accommodation, homeless shelters, stations, parks or even in some Southern European countries in caves. In order to create a common framework for the definition of homelessness, the European Typology of Homelessness and Housing exclusion (ETHOS) was developed by FEANTSA, a European umbrella of homelessness organisations. The ETHOS typology takes into account physical, social and legal aspects of a 'home'. It classifies homeless people according to four main living situations, i.e. rooflessness, houselessness, living in insecure housing, and living in inadequate housing.

Rooflessness is regarded the most extreme condition of homelessness. Roofless people lack a home in the physical, the social and the legal sense; they are sleeping rough. Houselessness refers to people in (temporary) shelters and accommodations. The houseless have a physical place to live but experience exclusion in the legal and social domain. People in insecure housing do have a roof over their head but their housing status is insecure as they might be under the threat of eviction or have merely found temporary accommodation with family or friends. The last category refers to people living in inadequate or substandard housing, meaning that living is associated with many inconveniences.

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1. [epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/People\\_at\\_risk\\_of\\_poverty\\_or\\_social\\_exclusion](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/People_at_risk_of_poverty_or_social_exclusion), accessed at 27 February 2014.

There are no official statistical European data on homelessness. Much remains under the radar. Consequently one has to rely on secondary evidence provided by cities, by emergency health care institutions, by NGOs running night shelters, by independent research institutions, etc. Recent research has provided has come up with many recommendations as to how to measure homelessness<sup>2</sup> but so far estimations presented are often based upon different criteria and assumptions. It all depends on what exactly is measured and how. In all, the total number of homeless persons in Europe is estimated to be over three million. Immigrants are largely represented, in the latest years since the accession of the EU 10 countries, not only asylum seekers and irregular immigrants, but also EU mobile citizens. The Roma, both migrant and local, form a large group of excluded homeless people.

### **3. Homelessness as a constitutional question**

#### **3.1 Legal issues**

All European countries treat the question of poverty and social welfare as a constitutional concern. It does so primarily by recognizing the responsibility of the state for the social security and housing of its citizens, by means of socio-economic fundamental rights. Indeed, the constitutions of all the European countries and many countries elsewhere, include such rights, with a notable exception of the UK which does not have a written constitution.<sup>3</sup> There is much conflicting opinion what these socio-economic fundamental rights mean, but the final responsibility of the state for the social welfare of its citizens cannot easily be challenged. Social security and housing are a public concern, and if the system fails, it is the state that can be held accountable.<sup>4</sup> If this applies for the general social welfare state a large, surely it applies even more for the protection of the homeless, who are at the bottom of ladder of vulnerability.

Incidentally, recognizing housing and/or social security as a constitutional imperative does not necessarily mean that it can be invoked as such successfully in court. For an example outside Europe: in September 2013 Superior Court of Ontario rejected a constitutional claim in a case brought up by four individuals and several organisms against both the federal and the Ontarian government to get them to implement policies to reduce and eliminate

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2. For an overview cf. Busch-Geertsema, Volker (2010) 'Defining and measuring homelessness' in: *Homelessness research in Europa, Festschrift for Bill Edgar and Joe Doherty*, Feantsa, p.19-40.

3. Cf. Katrougalos, G.S (1996). 'The implementation of social rights in Europe, *The Colombia Journal of European Law* p. 277-312.

4. Cf. Vonk, G.J. & Katrougalos, G.S (2010), 'The public interest and the welfare state, a legal approach' in: G.J. Vonk & A. Tollenaar (eds.), *Social security as a public interest, a multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerpen: Intersentia, p. 75.



homelessness and inadequate housing.<sup>5</sup> However, the claim was rejected on grounds of arguments relating to the separation of powers between the administration and the judiciary: the matter was deemed to be too political.

Homelessness is not only a constitutional subject from the point of view of socio-economic fundamental rights, but from the point of view of the internal state organisation. What is the division of power between the central, regional and local level? Clearly in confederations such as Switzerland<sup>6</sup>, this is an important question, but also for unitary states the co-operation between the various layers of government is a major point of concern. As by their very nature services for the homeless must be delivered at the local level, national programmes such as these involve a system of multilevel governance. It is for this reason that the legal infrastructure for supporting the homeless should be based a constitutional framework where central and local governments have to work together. Homelessness then becomes a problem of 'governance'.

Actually, the latter observation also applies for the relationship between the member states and the EU. Apart from the interferences following from the EU regime on the freedom of movement of persons, the fight against homelessness still rests firmly the member states themselves. A legal basis for any binding EU-measures in the field is shaky, according to some entirely absent.<sup>7</sup> However this does not mean to say that the member states cannot work together in this field and the EU Commission cannot facilitate and promote such co-operation. By doing so, the member states can learn from each other and hold each other accountable for any lack of progress made in this field. Indeed, the EU Commission has now set the first steps towards such common strategy against homelessness as part of the so called Social Investment Package.<sup>8</sup> Such initiatives are part of the total multilevel governance structure for combatting homelessness.

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5. Ontario Superior Court, 6 September 2013, *Tanudjaja v. the Attorney General* (Canada) 2013 ONSC 5410. Cf. Perrault, Elizabeth (2014) 'The right to housing as a constitutional imperative; the situation in Canada' in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.), Wolf legal Publishers.
  6. Cf. Poussin, Dephine (2014) 'Swiss social assistance for foreign nationals' in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.) Wolf legal Publishers.
  7. Verschueren, H. (2012) 'Union law and the fight against poverty: which legal instruments?', in: B. Cantillon, H. Verschueren & P. Ploscar (eds.), *Social inclusion and social protection in the EU : interactions between law and policy*, Antwerpen: Intersentia, p. 208-201.
  8. European Commission (2013), *Combating Homelessness in the European Union*, Brussels: SWD 342 def.

### **3.2 Policy challenge: local dumping**

In public law it is a known phenomenon that competences in the field of negative state interference tend to centralise while for the responsibility for positive state interference to sink to the bottom.<sup>9</sup> It is on the basis of this proposition that I discuss a major policy challenge in the field of homeless policies, the danger of 'local dumping'.

A common feature in all countries is that the responsibility for social care for the homeless (shelter, housing, livelihood support) rests very much with the local authorities. I am now not referring to the regular national social assistance and housing schemes which are administered at a local level but to separate schemes and initiatives which specifically target the homeless and the destitute, organised and financed by the local authorities. Homeless persons rely heavily on these kinds of services. National authorities may not be interested in providing aid to those who have become destitute, but local authorities cannot ignore their presence and must offer support, if not for the reason of charity then for the reason of maintaining public order.

Certain groups can be very vulnerable in the local welfare state model. Migrants with weak immigration status are often not only excluded from formal national social housing and social assistance schemes, but also from the separate local initiatives aimed at protecting the homelessness. Access may be refused for legal reasons but there are other explanatory factors as well (habitual residence or local connection test, the duty to register, prejudice, mutual distrust, etc.). Also the Roma, who often live outside the formal public domain, may face such exclusions. Now, only civil society remains to offer a helping hand. It is a domain of the Salvation Army, churches, voluntary citizen's initiatives, charities and political parties.

In practice, at the local level civil society support and public welfare are much intertwined.<sup>10</sup> For example cities channel their support through civil society agencies or simply provide financial support to such agencies. Of course, there is nothing wrong with local welfare state support and civil society involvement. Homeless support can only be arranged at this level as the interventions must be adjusted to the needs and requirements of each individual and the local circumstances. Yet the local welfare state model which evolves outside a national

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9. Tollenaar, A. (2014) 'Homelessness, constitution and governance' in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.) Wolf legal Publishers, p. 28-30.

10. Pieters D. & Schoukens, P (2004) *Explanatory report on the access to social protection for illegal labour migrants*, Strasbourg: Council of Europe .

financial and regulatory framework, has many drawbacks.

In the first place there is the risk that local authorities may be inclined to raise barriers to prevent outsiders from receiving support due to the fear of 'social tourism', now between local communities. The same fear may hinder the municipalities in further developing the quality and the scope of their services. The raising of barriers for outsiders has been reported as a new phenomenon in the Netherlands, in the form of a *regionaal bindingsvereiste* (local connection test) for shelter and support for the homeless under the Social Support Act<sup>11</sup>, as well as in the UK, where cities are allowed to apply a local connection test for housing support.<sup>12</sup> Such requirements hit migrant homeless persons particularly hard. National subjects who are rejected, have the opportunity to go to another place with which they have a stronger bond, but for new groups of immigrants such places simply do not exist, unless they go back to their home countries. Sometimes barriers are put into place not in reaction to a real influx of destitute foreigners, but simple in fear thereof. Thus for example, the spectre of Roma coming from new EU member states haunts many local communities in Europe. Whether applying a local connection test as a requirement for homeless services is in line with international human rights standards is debated. In ECSR has taken a strong stance against it in a procedure initiated against the Netherlands by Feantsa, a European umbrella organisation of homelessness organisations (Complaint No 86/2012).

In the second place, local welfare structures are strongly fragmented, limited in scope and vulnerable to economic adversity. Hence they are not always capable of providing support at an adequate level on a structural basis, particularly not in these times like these in which countries must face the consequences of a major financial and economic crisis. Another weakness related to this is that local welfare support structures are subject to populist and xenophobic pressures. Thus, for example there are indications that in countries like Italy, France and Greece local projects for the Roma have grounded to a halt by lack of local political support.<sup>13</sup>

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11. Cf. Roorda, Rieneke (2014) 'Homelessness and Access to Justice in the Netherlands' in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.), Wolf legal Publishers.

12. Cf. Wallace, Sarah (2014) 'What does the right to housing in the United Kingdom entail and can it be said to be far and non-discriminatory' in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.), Wolf legal Publishers.

13. EU Agency on Fundamental Human Rights (FRA), United Nations Development Programme (2012), *The situation of Roma in 11 EU Member States Survey results at a glance*, Luxembourg: Publications office of the European Union

*The policy challenge is to curb the trend of local dumping by making sure that preventing and combatting homelessness is defined as a national responsibility in line with the constitutional imperative. This implies that there should be national financial and regulatory framework to support the local authorities in their efforts. The national government's final responsibility for services for the homeless does not rule out the involvement of EU institutions in policies regarding these services. In order to avoid any Baron-von-Munchhausen-effect, it is necessary for Member States to keep each other informed about how they live up to this responsibility and that progress is monitored. The European Commission must (continue to) play a co-ordinatory role in this respect, using its powers under art. 153(1)(j) TFEU. A binding EU-instrument to buttress the national responsibilities would be even better.*

#### **4. Homelessness, public order and criminal law**

##### **4.1 Legal issues**

Providing social welfare support is not the only way for states and local authorities to solve the problem of homelessness. Another policy is to respond with repressive measures, ranging from local bylaws which prohibit begging to national policies aimed at the criminalisation of illegal stay.

Historically speaking, homelessness and repression are no strangers to each other. The nineteenth century poor laws made a clear cut distinction between the deserving poor and the undeserving. Those who were not incapacitated as a result of sickness, handicap or old age (the so called able bodied) were forced to participate in publicly organized employment. Work houses were set up in which men, women and children had to perform manual activities in miserable conditions for long hours a day. There was no easy escape from the work house. Dealing with poverty was considered to be part of the policing function of the state. Vagrancy was a criminal offence. In some countries vagabonds were literally rounded up and kept in confinement in forced labour camps.

With the advent of the welfare state measures were increasingly aimed at protection, supporting and integrating the homeless in the society. Poverty became a subject of social policies. Yet a repressive response to homelessness is always looming in the background. While vagrancy has been abolished as a criminal offence, it is still possible for towns to enact

bylaws, prohibiting loitering in the public spaces, public drinking, begging etc.

A remarkable insight following from our own research carried out within the framework of our project Homelessness and the law, is the width and variety of the new public order and criminal responses to homelessness. An example of such response is the phenomenon of the exclusion order applying to homeless people after they have disturbed the public order or violated a local regulation. The exclusion order is a ban imposed on an individual prohibiting him or her from being in a specific area within the local authority or from being within a particular distance from some object within the local authority. Exclusion orders may be part of the criminal law system, but this is not necessarily the case. Thus, for example in the Netherlands and Belgium they are perceived as administrative measures, while in England and Wales a failure to comply with an exclusion order is perceived as 'civil contempt of court'.<sup>14</sup> An interesting paradox in this respect is that on the one hand a decriminalisation of the exclusion order makes it possible for local government to tackle anti-social behaviour without this resulting directly in a criminal record for the offender. On the other hand the offenders have less legal protection.

Another repressive response is to treat begging as a criminal offence. In many countries despite the decriminalization on a national level, local authorities have introduced their own local regulations prohibiting begging. While such measures can reduce the nuisance caused by beggars, as perceived by the public, they weaken the position of the homeless even further.<sup>15</sup>

What is also interesting is that in criminal law procedures judges are not likely to be very inclined to take homelessness into account as a relevant factor. This is not without relevance as it appears that in a disproportionate percentage of prisoners go to prison homeless while even more come out homeless.<sup>16</sup> Somehow the criminal law system and its emphasis on personal responsibility seems to be unsuited to treat the threat of homelessness as a relevant factor for sentencing. It is not considered an excuse for crime or a reason to soften the punishment.

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14. Cf. Vos, Michel & Duran, Dewi (2014) 'Tackling anti-social behaviour and homelessness with exclusion orders in the Netherlands, Belgium, England and Wales, in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.), Wolf legal Publishers.

15. Cf. Bandsma, Koen (2014) 'Is begging a crime? A case from the Netherlands' in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.), Wolf legal Publishers.

16. In the Netherlands: these percentages are 10% and 25%. Cf. Van der Veen, Miko (2014) 'Is the threat of homelessness a relevant factor in sentencing?' in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.), Wolf legal Publishers.

#### **4.2 Policy challenge: the rise of the repressive welfare state**

Repressive responses to homelessness are making a comeback<sup>17</sup>, most notoriously in Hungary which in October 2013 introduced a new act enabling local authorities to make it a criminal offence for the homeless to live in public spaces, despite earlier criticism from the European and international human rights institutions and the Hungarian Constitutional Court.<sup>18</sup> For our subject of homeless migrants, there is another trend to be taken into account as well, i.e. the criminalisation of illegal stay of non-nationals. The trend has been commented upon elsewhere, amongst others in 2009 in a report prepared by Elspeth Guild for the Commission for Human Rights of the Council of Europe.<sup>19</sup> The report shows that an increasing number of countries are making illegal entry an offence under criminal law, punishable by fines, imprisonment and expulsion. According to Guild the trend to criminalize irregular immigrants bears a number of common characteristics. First there is the pervasive way in which the measures (a) separate foreigners from citizens through an elision of administrative and criminal law language and (b) subject the foreigner to measures which cannot be applied to citizens, such as detention without charge, trial or conviction. Secondly, there is the criminalisation of persons, whether citizens or foreigners who engage with foreigners. The message which is sent is that contact with foreigners can be risky as it may result in criminal charges. This is particularly true for transport companies (which have difficulty avoiding carrying foreigners) and employers (who may be better able to avoid employing foreigners at all). Other people, going about their daily life, also become targets of this criminalisation such as landlords, doctors, friends etc. Contact with foreigners increasingly becomes associated with criminal law. The result may, according to Guild, include rising levels of discrimination against persons suspected of being foreigners (often on the basis of race, ethnic origin or religion), xenophobia and/or hate crime.

*The policy challenge is not so much that states must refrain from treating homelessness as public order problem, but that they cannot resort to the criminal law system or public order measures as an alternative for social protection. The constitutional imperative to prevent and protect the homeless must be realised by measures aimed at the welfare of individuals*

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17. Fooks, G. & Pantazis, C. (1999) 'The criminalization of homelessness, begging and street living', in: P. Kennett & A. Marsh (eds.), *Homelessness, exploring the new terrain*, Bristol: Policy Press.

18. The Court rejected an earlier Hungarian law criminalising homelessness on 12 November 2012, case I/01477/2012

19. E. Guild, *Criminalisation of Migration in Europa: Human Rights implications*, Issue Paper Commissioner for Human Rights, Council of Europe Publishing 2010.

*concerned; the prison house is not an alternative to the welfare system. Member states should agree on a European level, that they cannot adhere to the required social standards for the protection of the homeless through detention and criminal surveillance measures.*

## **5. Homelessness, mobility and migration**

### **5.1 Legal issues**

Homelessness and migration are very much intertwined. According to data gathered by Feantsa in 2012 there is an increasing proportion of homeless persons who are immigrants. They do not only cover (refused) asylum seekers, stranded third country workers, but also and increasingly EU mobile citizens. What matters here to us is that legal exclusions are one of the causes of this. The situation is complex. Depending on their specific status migrants might be formally excluded from access to the labour market in the host country and/or to the social services which are designed to protect the vulnerable and the weak: social insurance, assistance, social housing and shelter, medical aid, etc. When a migrant is legally speaking not entitled to access work or this social safety net, he or she may be forced to live on the fringes of society and on the streets.

The deficit in legal protection for migrants does not only exist in national law, but also in international and European law. In fact, some of the legal causes of destitution and homelessness among EU mobile citizens can be traced back directly to weaknesses in European protective regulatory standards.<sup>20</sup>

For EU citizens the greatest impact stems from the provisions on the freedom of movement of persons. These provide not only access to the labour markets, but they also protect against the loss of social security rights and discrimination on grounds of nationality in the field of all sorts of social and fiscal advantages. However the relevant EU provisions are not very generous for the poor, defined as persons with 'insufficient resources of their own'. They have no temporary residence rights and their right to social assistance benefits is somewhat

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20. For an overview of the state of the law, cf. Verschueren, H. (2012) 'Union law and the fight against poverty: which legal instruments?', in: B. Cantillon, H. Verschueren & P. Ploscar (eds.), *Social inclusion and social protection in the EU : interactions between law and policy*, Antwerpen: Intersentia p. 205-231 and the various contributions included in: Guild, E, Carrera S. & Eisele, K (2013) *Social benefits and migration: a contested relationship and policy challenge in the EU*, Chapter 8, CEPS paperbacks; see also by the same author 'EU Migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds.): *Research Handbook on European Social Security Law*, Elgar Publishing, 2015, 413-445.

clouded. Indeed, when it comes to this category of EU-citizens it appears that there are still many uncertainties and unresolved questions. For example, we do not under what conditions mobile citizens may lose their preferred EU residence status on the grounds that they do not have sufficient resources of their own. Neither do not really know what exactly is meant by a 'genuine link' with the labour market with the ECJ requires for job seekers who want to claim social assistance benefits is their host country.<sup>21</sup> Also it is not fully clear whether local authorities can apply a 'local connection test' when EU mobile citizens apply for shelter and emergency relief, although the odds are against it. Such a test would probably not satisfy the non-discrimination principle on grounds of nationality, but this has not yet been confirmed by the ECJ.

By reason of the many grey areas which exist in between ECJ case law on European citizenship and the hard texts of secondary EU law, states have considerable leeway to interpret EU law according to their own national interests. In many Northern member states, notably Germany, the Netherlands and the UK, the right to residence and to social assistance and housing for poor and destitute EU citizens is clouded in legal controversy, very often involving a tense relationship between legislature and judiciary.

Recent CJEU case law concerning access to social protection of non-economic mobile citizens has taken a distinct restrictive turn. A sequence of cases: *Dano* (C-333/13), *Alimanovic* (C-67-14) and *García-Nieto* (C-299/14), highlighted thresholds applying in Residence Directive 38/2004 for non-economic migrants without insufficient resources of their own. The restrictive approach climaxed in the high profile infringement case of the Commission versus the UK (C-308/14) which was delivered on the eve of the Brexit referendum. In this case the CJEU ruled that legal residence test applying in British law for obtaining non-contributory benefits was not contrary to social security co-ordination Regulation 883/2004. This new case law has created leeway for the member states to raise new obstacles for non-economic mobile citizens in their national law and practices

For the destitute and the homeless, the bottom line is that they are no longer protected by EU law. As minimum subsistence benefits schemes of the member states often employ conditions with regard to legal residence, a loss of EU residence status may imply a subsequent loss of benefit rights. Recent CJEU case law referred even allow for an automatic refusal of rights for

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21. ECJ Case C-138/02 (*Collins v. Secretary of State for Work and Pensions*) and C-22/08 (*Vatsouras and Koupatantze, v. Arbeitsgemeinschaft (ARGE) Nürnberg*).



not economically active citizens whose residence depends on the having sufficient resources. Despite the many guarantees EU law offers in case forced return,<sup>22</sup> the result is nonetheless that EU citizens may eventually be expelled. The lack of resources and the threat of expulsion may force people to move underground, to resort to marginal activities in the shadows of the official society, to beg and to sleep rough. Some will end up in dire straits, others may pick up their lives and move elsewhere to look for better fortune.

If the above situation applies for destitute EU citizens, the plight of third country homeless cannot be very much better. It is not, although this does not mean to say EU is totally irrelevant or this group. There is a growing body of directives which have some impact on the prevention of homelessness and destitution, based on Articles 77 to 81 TFEU. A characteristic of most of these directives is that they mostly protect well defined, limited groups of persons: such as victims of human trafficking<sup>23</sup>, asylum seekers (now defined as persons seeking international protection<sup>24</sup>), migrants who are engaged in voluntary or involuntary return proceedings to their home countries.<sup>25</sup> Also permanently residing third country nationals enjoy some protection.<sup>26</sup>

## **5.2 Policy challenge: from exclusion to integration**

Homeless migrants are outsiders. They live in a parallel world of undeclared labour, alternative social support services, sheltered accommodation, make shift camps spatially separated from the rest of the society or even in caves. In this way they form sub strata of society, situated at the very bottom of the social order. The exclusion from the formal public domain is expressed in a weak legal status of migrants with insufficient resources have a weak migration status and vice versa. The weak legal status negatively effects access to the regular social security system and to social housing. It threatens the migrant with forced removal from the country and hinders the acceptance of a policy geared towards emancipation and integration into the society. The result is that homeless migrants live a life in limbo. They neither leave the country nor will they be fully accepted as regular citizens. Even when the immigration status is as such not an obstacle for claiming support, access to benefits and local support may be made impossible by national residence or local residence requirements.

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22. Article 14(3) and Article 33(3) Directive 2004/38/EC

23. Human Trafficking directive 2011/36/EC

24. Directive 2013/33/EU laying down standards for the reception of applicants seeking international protection

25. Return directive 2008/115/EC

26. Long-term residence directive 2003/109/EC

The limbo status of homeless migrants can exist by virtue of the fact that they are under a duty to leave the country. But mostly they do not leave, neither are they expelled. There is just no evidence that return policies for homeless migrants are effective. When countries resort to forced expulsion measures, the measures prove to be ineffective or to run against basic European human rights standards (e.g. the France Roma policy in the second half of the last decade). When such measures are not taken and life is made simply very hard for homeless migrants, this does not seem to have any effect on the actual numbers of migrants returning either. If there is any result to be expected from return programmes, apparently such programmes must be framed in terms of voluntary social rehabilitation, such as the initiatives of the Polish charity Barka to 'reconnect' stranded homeless migrants with their countries of origin.<sup>27</sup> But even these initiatives are not free of criticism. Return policies remain a sensitive terrain.

Keeping migrants in limbo may not be seen as a form of collateral damage resulting from immigration policies. Such an approach is not constructive and contrary to the human dignity. The only alternative is for policies and services for homeless migrants to aim at the long term integration in the society. It seems contradictory to speak of integration when dealing with persons with a weak or no immigration status but there are little other alternatives. Perhaps curbing exclusionary policy to integration should first be done in the own back yard of the EU. While it is theoretically feasible to return EU nationals to their home countries when they lose their EU residence status, EU law imposes so many restrictions on this, that it can be doubted whether structural policy solutions should depend upon forced return. On grounds of article 14(3) of Directive 2004/38/EC an expulsion order shall not be the automatic consequence of the recourse of a European Union citizen or his or her family member to the social assistance system of the host Member State. Member states must examine whether the loss of income is the result of merely temporary difficulties. They should also take into account the duration of the residence and the amount of state benefits a person is receiving. Furthermore the CJEU requires that the proportionality principle should be adhered to: national measures must not go beyond what is necessary to achieve the objective of protecting the public finances of the host state. As a result of these strict conditions, it may no longer seem realistic or desirable for Member States to aspire to any structural policy towards forced return of EU nationals. Instead Member States should concentrate fully on the integration of the homeless. But nonetheless, some Member States such as Britain, Denmark and the Netherlands, have started

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27. <[www.barkauk.org](http://www.barkauk.org)>.

to make use of the new discretionary powers offered to them by the recent CJEU case law to actively remove mobile citizens who are without sufficient recourses of their own.<sup>28</sup> It is submitted that for the sake of a better integration of the homeless, this trend must be curbed. Only when this is in the best interest of the individual concerned, might integration also imply a voluntary reconnection with the home country, but of course this is a far cry from any forced return policy.

*The policy challenge is to accept that policies and services for homeless migrants should aim at the long term integration in the society instead of exclusion, starting with EU nationals, also when they have insufficient resources and rely on public funds of the host country*

## **6. Human rights responses and access to justice**

### **6.1 Legal issues**

Paradoxically, it is in view of the dire situation of the homeless and their lack of legal status that human rights play such an important role for this group. If the legislator is focussing strongly on the exclusion of social rights and repression, thereby ignoring basic human rights, the more inclined courts and human rights agencies will be inclined to address needs of the individual and to formulate legal boundaries.

Indeed, human rights agencies such as the EU Fundamental Rights Agency<sup>29</sup> and the UN Human Rights Council<sup>30</sup> have paid a great deal of attention to the theme of destitution and homelessness. Also, there is much case law of both the ESRC and the ECtHR<sup>31</sup>. Recent examples of important ESRC cases are CEC v. The Netherlands (Complaint No. 90/2013) and Feantsa v. The Netherlands (86/2012) in which the Committee gives elaborate views on the do's and don'ts that a state should take into account when implementing their homeless policies vis a vis specific groups.

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28. For the situation in the Netherlands,, cf. Kramer, Dion (2017), 'A place for the stranded Union Citizens', *ACCESS EUROPE Research paper 2017/05*.

29. Cf. *inter alia* Fundamental rights of migrants in an irregular situation in the European Union (November 2011); Migrants in an irregular situation: access to healthcare in 10 European Union Member States (October 2011); Migrants in an irregular situation employed in domestic work (July 2011); Housing policies promoting integration and community cohesion at local level (June 2009)

30. Cf. Guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, 18 July 2012.

31. Cf. the contributions included in Council of Europe (2012) *Redefining and Combating Poverty. Human Rights, Democracy and Common Goods in Today's Europe*, Strasbourg: Council of Europe Publishing.

Domestic courts play an equally important role. Thus, for example, in the Netherlands decisions of the ESRC in collective complaints procedures are often officially ignored on formal legal grounds as these are strictly speaking not legally binding, but nonetheless these decisions resonate in the case law of local courts, which eventually forces government to take action. Indeed, it was under pressure of domestic courts responding to the ECSR-decision of *DCI v. the Netherlands*<sup>32</sup>, that the Dutch government eventually had to agree to set up special family locations for irregular migrants, in order to avoid vulnerable young children being sent out onto the streets to fight for themselves.

The protection by the courts cannot be taken for granted. Homeless persons are not likely to fend for themselves to ask for legal redress. What is required is a system of legal aid which allows professional organisations or charities to make legal representations on behalf of individuals concerned.<sup>33</sup>

## **6.2 Policy challenges: homeless services should reflect basic human rights standards**

Human rights case law tends to flow towards some form of recognition of minimum social care responsibility, even in some cases for irregular immigrants. This minimum care responsibility does not express itself in some general rights to social and medical assistance, but rather in the recognition of a duty to provide medical support, shelter or aid in individual situations of exceptional vulnerability and need, for example when young children are involved, in cases of medical emergency or in cases where persons are left stranded and exposed. States are responsible for ensuring that there is a system of services for the homeless in operation that guarantees these basic requirements. This means that local authorities must open their homeless facilities to all stranded migrants, irrespective of status or nationality (instead of raising legal/administrative obstacles). Also states should work at the improvement of the infrastructure for protecting the homeless in general. Such infrastructure should at least entail access to food, clothing, shelter, basic medical care and education for children at a level which satisfies the generally accepted European standard. In case of doubt about what this standard is: Directive 2013/33/EU on the reception of persons applying for international protection provides a perfect point of reference.

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32. ECSR 20 October 2009, complaint No. 47/2008 (*Defence for Children v. the Netherlands*)

33. Cf. for the situation in the UK Willis, Sarah (2014) 'Homelessness and access to justice in the UK' in: *Homelessness and the law*, G.J. Vonk & A. Tollenaar (eds.), Wolf legal Publishers.

*The policy challenge is to make sure that services of the homeless are in line with basic human rights standards and that these services are universally accessible, irrespective of nationality or status.*

## **7. Proposals for ameliorating the legal position of the homeless**

In this last section I will turn my eye to the future and look into possible policy options for improving the legal position of the homeless, which address the four policy challenges formulated in the preceding four Sections. Two possible options will be briefly touched upon. The first one deals with the position of EU-citizens. Is it feasible that the remaining restrictions applying in the field of freedom of movement and access to social rights could be lifted in order to give full protection to all mobile citizens, including those with insufficient resources of their own? As fear for social tourism and abuse of welfare rights is often adduced as the main obstacle for making this last step, we will focus in particular on various methods of sharing the costs of providing housing and social assistance between the member states. Perhaps such burden sharing may take away some of the fears that exist in many member states. The second scenario explores the possibility of introducing common standards for the protection of the homeless in an EU instrument. In particular we are interested in standards that reflect the minimum human rights responsibility member states have towards the protection of vulnerable persons who are in a situation of extreme need who reside in their territories, regardless of nationality and immigration status.

### **7.1 Towards unlimited access to the social safety net for EU-mobile citizens**

Homeless and destitute EU citizens would gain very much from a decision to lift the final restrictions in the area of the freedom of movement for persons without sufficient resources. Suppose secondary EU law would place this group on equal footing with workers and restrictions applying to the right to social assistance were scrapped? Residence rights would become inviolable and access to the social safety net fully secured. The reason why member states feel they cannot take this last step towards unconditional freedom of movement for all EU citizens, including non-active persons with insufficient resources, is related to the protection of public funds and the fear of an influx of claims from mobile EU citizens. The present restrictive conditions aim to forestall a migration of EU mobile citizens without sufficient means who are seeking a host country offering favourable social assistance schemes.

This observation brings us to the heart of the debate about 'social benefit tourism'. While so

far there is no evidence that the EU freedom of movement results in any disproportionate burden on both the welfare system and the labour market,<sup>34</sup> there will always be a fear that this may change in future, particularly when conditions are further relaxed. And relaxing the conditions is not what all governments aim at.<sup>35</sup>

Perhaps the introduction of a system of sharing the cost of social assistance and housing benefits to EU mobile citizens between the member states can pull some of the member states over the line in accepting a further liberalisation of conditions for the freedom of movement of persons with insufficient resources. There are contemporary precedents for cost sharing mechanisms. For example, social security Regulation 883/2004 applies the system for various branches of benefit, most notably health care (Article 34) and unemployment benefits (Article 64). Social assistance is excluded from the material scope of application of this Regulation and is therefore not included in such co-ordinating mechanisms.

The most straight forward way of cost sharing would be that it is not the EU country of residence that pays the cost social assistance and housing benefits but the EU country of origin, in other words the member state of which the EU mobile citizen is a national. In principle the host state can charge the costs of the benefits to the country of origin. This is a solution that is most closely in line with the opinion that each country is primarily responsible for the financial wellbeing of its nationals. A more developed costs sharing system would be to charge the subsistence costs not to the member state of origin but to the European Union as a whole. The consequence of this is that the costs that may arise in connection with a possible change in the migration pattern of needy EU citizens are not borne unilaterally by the country of origin but are distributed evenly amongst all the member states. This second option of a common funding of the costs of social assistance and housing benefits would be more an expression of mutual solidarity between the member states.

## **7.2 Towards common EU standards for the protection of vulnerable persons in need**

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34. Cf. European Commission (2013) *A fact finding analysis of the Member states' social security systems of the entitlements of non-active EU migrants to special non contributory cash benefits and health care granted on the basis of residence*, Directorate-General for Employment, Social Affairs and Inclusion. See also the analysis included in Guild, E. Carrera, S & Eisele, K. (2013) *Social benefits and migration: a contested relationship and policy challenge in the EU*, Chapter 8, CEPS paperbacks.

35. Cf. Joint letter of the ministers of the interior of Germany and Austria, the UK home secretary and the Dutch immigration minister sent to the Irish Presidency in May 2013.

A proposal for common EU standards for the protection of the homeless brings us close to the debate of the EU harmonisation of minimum income schemes. As early as 1981 the Commission issued a communication which addressed the problem of poverty in Europe and the need for common minimum income standards. It was suggested by the Commission that a minimum income should be introduced in the member states which should take into account the minimum requirements of the individual or the family, be universally available to all non-active persons and be granted as a right.<sup>36</sup> The Commission continued to pursue this idea, which led to the Council Recommendation 92/441/EEC of 25 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems.<sup>37</sup> Obviously the recommendation was not binding and almost two decades later, in 2009 a report commissioned by the European Commission to the European Network of National Independent Experts on Social Inclusion on Minimum Income Schemes across EU Member States made apparent that while most member states have some form of minimum income scheme, the criteria of this recommendation are often not met.<sup>38</sup> In an attempt to address this problem, in 2010, the European Anti-Poverty Network launched a working document containing an elaborate and detailed proposal for a minimum income framework directive, prepared by former MEP Anne van Lancker.<sup>39</sup> The same year a proposal for a resolution for such a directive was tabled in the European Parliament, but failed to get a majority. The Commission itself has not taken any further steps in this direction either.

It is likely that the idea of harmonised minimum income standards for the EU will remain on the table, be it as an instrument within itself or as part of a strategy on the active inclusion of people who are excluded from the labour market. However, below, we shall steer away from the minimum income debate and concentrate solely on the idea of introducing common standards for the protection of vulnerable persons in extreme need. The background, purpose and rationale of introducing such standards are different to proposals for a European minimum income. While the latter are aimed at the development of an adequate nationwide minimum benefit level which adheres to European standards, the former address the substrata of the social system which includes more primary forms of support, shelter and aid for

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36. Com (81) 410 def.

37. [1992] OJ L245/46

38. Frazer, H. and Marlier, E. (2009) *Minimum Income schemes across EU Member States*, EU Network of National Independent Experts on Social Inclusion, <http://www.peer-review-social-inclusion.eu/network-of-independent-experts>.

39. Van Lancker, A. (2010) Working Document on a Framework Directive on Minimum Income, EAPN, Brussels.

the destitute and the homeless. It stipulates the final responsibility of each member state for making sure that help is actually provided when this is needed, most likely at local level. Protective standards for vulnerable people in extreme need are not about an objective right to a certain level of social assistance. Neither are they rooted in anti-poverty policies, at least not exclusively. The primary goal is to adhere to the basic human rights responsibility ensuing from both UN and Council of Europe human rights treaties and the EU Charter of fundamental rights. It follows from these human rights that states have an obligation to provide medical support, shelter or aid in situations of extreme need or vulnerability, for example when young children are left unprotected or in cases of medical emergency. This human rights obligation is highly individualised but member states could nonetheless -at least- accept a duty based upon the discretionary powers of the local authorities. With this duty corresponds a reflexive right for the individuals concerned. As the human rights responsibility extends to all human beings regardless of migration status or nationality, they apply vis-à-vis all vulnerable people, be it local or stranger, regular or irregular.

The human rights rationale of an EU protection instrument for vulnerable people in extreme need is also interesting from the point of view of the discussion about the legal basis of such instrument. It is submitted that when such basis does not exist in the TFEU, an alternative route can be explored ensuing from the EU membership to the human rights treaties of the Council of Europa. It would be an innovative approach to search for a legal basis in the European Convention of human rights, in particular in art. 3 and art. 8 ECHR and in the relevant provisions of the European Social Charter.

While the primary rationale of an EU protection instrument for vulnerable persons in extreme need is to create an objective standard for the positive obligations that member states have under human rights obligations, such an instrument further helps to curb some of the policy challenges addressed in the previous Sections. It stops the process of 'local dumping' by reaffirming a final responsibility of the member states for care for the homeless. It also prevents member states from slipping further into a merely repressive response to the problem of homelessness. The instrument could include a provision stipulating that criminal detention and surveillance does not serve as a form of protection within the meaning of this instrument.

The instrument should apply to all persons who are present in the member states, regardless of the degree of integration, nationality or immigration status. This very wide personal scope follows from the human rights background of the instrument. The other side of the coin of the wide personal scope of application is that groups deserving protection should indeed be narrowed to those who 'vulnerable and in extreme need'. It follows from human rights case



law that belonging to a certain collective group: young children, the handicapped, Roma, etc. is seen as an important indication for one's vulnerability.<sup>40</sup> This could be reaffirmed in the instrument, with reference to the various protected groups concerned. In particular it is suggested that the homeless are referred to as one of the categories of vulnerable people. (Group) vulnerability is not enough to invoke the right to protection. There should also be a situation of 'extreme need'. In order to cut short a lengthy legal analyses dealing with this concept, we propose that such a situation occurs when denying protection seriously aggravates the predicament of an individual and exposes him to an inhuman, degrading or life threatening situation. For example, by not providing proper shelter to a person who suffers ill health and anxiety, the situation of that person may deteriorate even to the extent that it can be said to be inhuman, degrading or life threatening. Denying help is then tantamount to an active interference and harmful action.

As to the level of protection, a suitable point of reference is Directive 2013/33/EU laying down standards for the reception of applicants for international protection. Article 17(2) of Directive provides an overall credible description of the protective standard involved: 'Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health' An attractive aspect for relying on Directive 2013/33/EU by analogy is that the directive actually stipulates further rules as to what is to be understood by this protective standard (Article 17- Article 19) as well as additional guarantees such as the right of the families to stay together (Article 12) and access to housing for minor children (Article 14).

Apart from the above type of standards dealing with the quality of protection and with ancillary rights (family life, access to schools etc.), the instrument should include an overall obligation for the member states to set up a regulatory and financial framework which enables the local authorities or third parties to provide the required level of protection. This infers that national government cannot define the care for the homeless exclusively as a regional, local or civil society affair. Also it could be stipulated that national governments should provide for additional funding in case a local community is confronted with an influx of homeless and destitute persons. Simultaneously, the member states should make sure that the protection at local level is actually realised in line with the obligations of the instrument. This infers the setting up of a strict supervisory and reporting mechanism to the national government.

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40. Peroni, L. & Timmer, A. (2013) 'Vulnerable groups: the promise of an emerging concept of European human rights', *ICON* 2013(4), p. 1056-1085.

In view of the rise of repressive responses to homelessness in some countries it is furthermore important that it is stipulated that member states cannot adhere to the required standards through detention and criminal surveillance measures.

Another important standard concerns the domicile of protection. Member states are responsible for protecting all vulnerable persons in extreme need who are present in the country. This implies that there is no room for a national habitual residence test. The instrument should further stipulate that when local authorities apply a local connection test, the member states must guarantee that such a test does not stop local authorities from providing temporary relief until the person is handed over to the authorities where the individual is considered to be rooted. For those without any local connection at all, protection must nevertheless be granted by the local community where the individual is present.

Moreover, the instrument could cover the issue of access to the justice system. This could be realised by a provision which obliges member states to make sure that individuals who are refused aid, will receive a decision in writing which is subject to review and appeal.

Lastly, it would be relevant to include a clause on the possible return of an individual to his country of origin, a so called reconnection clause. Return must be voluntary and measures should be based upon a consensus amongst all the stakeholders, including the sending and receiving member states and should serve the best interest of the mobile citizen or migrant.